Supreme Court of the United States.

October Term, 1904.

M. H. COURTNEY, *Appellant*,
v.
LOUIS A. PRADT, Executor of MERRIT B. ATWATER, and WILLIAM C. ATWATER, *Appellees.*
No. 93.

APPELLEES' BRIEF ON MERITS.

Before proceeding to brief this case on its merits, we respectfully request the attention of the Honorable Court to the motion of the appellees, statement of facts on which same was made, and brief thereon, filed during the last term, but passed by the Honorable Court for final disposition until the hearing of the case on its merits. We respectfully reiterate our contention that this Honorable Court has no jurisdiction of the appeal, for the reason set out in said papers, and insist that the appeal should, for that reason, be dismissed.

Statement of the Case.

Accompanying the motion above named, will be found a statement of the facts on which the motion is based. From that statement, we copy largely in giving the facts pertaining to the merits.

On the 25th day of September, 1901, the appellant, M. H. Courtney, filed a petition in equity in the Powell Circuit Court, Kentucky, against the above-named appellees. By said petition he stated, in substance, that, in

1890 and prior thereto, Merrit B. and Wm. C. Atwater were partners under the firm name of M. B. Atwater & Company; that prior to the 10th of December, 1890, the appellant (plaintiff, in the court below) had rendered valuable services for said partnership, and there was a difference between appellant and said partners as to the amount appellant was entitled to receive for said services; that said partners, in order to adjust the said difference, proposed, by letter of December 10, 1890, to give to appellant, in satisfaction of his claim, stock in the Atwater & Fair Lumber Company, a Wisconsin corporation, of the face value of $5,000, with a guarantee that it was worth $8,000, and that said firm would, at the end of that season's cut, pay appellant $8,000 in cash therefor; that appellant accepted said proposition, by letter, and, at the end of the season's cut, demanded of said partners a fulfillment of their offer; but his demand was not complied with, and that said partners wholly failed and refused to transfer to said appellant said stock, or pay him said sum of $8,000, or any part thereof; that in the year 1898, the said Merrit B. Atwater, a citizen of Wisconsin, died testate, and appointed Louis A. Pradt his executor; that said will was duly probated by the County Court of Marathon County, in the State of Wisconsin, and that said Louis A. Pradt had duly qualified as such executor and is now acting as such. The petition further stated that said Merrit B. Atwater, by his will, devised to his daughter, Charlotte R. Pradt, his residence in the city of Wausau, Wis.; to Sarah Downs, $1,000; to defendant Wm. C. Atwater, all of his right, title and interest in and to The Seamless Structural Company, of Milwaukee, Wis.; and the residue of his estate—real, personal and mixed—to his wife, Charlotte Atwater, for and during her natural life, and, after her death, he bequeathed and devised to said Wm. C. Atwater an undivided one-sixth interest in

said residue. The petition further stated that, the Atwater & Allen Land and Lumber Company (a different corporation from the Atwater & Fair Lumber Company, above mentioned, also a Wisconsin corporation),

> "Is a corporation duly created by and organized under the laws of the State of Wisconsin, with power to buy, sell, own and hold real estate in the State of Kentucky, and that prior to August, 1901, said corporation did buy and own real estate in the State of Kentucky, and practically all of its assets consisted of real estate in the said State of Kentucky. Plaintiff states that, during the month of August, 1901, said corporation sold its said real estate and realized a large sum of money therefor, and that practically the only business ever done by said corporation was to buy, own, hold and sell said real estate in the State of Kentucky.
>
> "Plaintiff states that Merrit B. Atwater, at the time of his death, *owned stock in said corporation*, and plaintiff states that said corporation now owes to the defendant, Louis A. Pradt, executor of Merrit B. Atwater, deceased, a large sum of money as such executor. That the chief office and place of business of said corporation in the State of Kentucky is in Clay City, Powell County, Kentucky, and that said corporation has an agent resident there, upon whom a summons can be served." (Printed record, page 3.)

The allegation, just quoted, was for the purpose of procuring, and was followed by an attempt to state grounds for, a general order of attachment against the *property belonging to the estate of Merrit B. Atwater, located in Kentucky.* A further statement followed, that appellant knew of no other creditors of the said Merrit B. Atwater, deceased, in Kentucky, and that the assets of the estate of the said Merrit B. Atwater, in Wisconsin, exclusive of the stock held by him in the Atwater & Allen Land and Lumber Company was more than sufficient in value, to

pay all of the debts of said estate owing to creditors outside of the State of Kentucky.

Appended to said petition was the following prayer:

> "Wherefore, plaintiff prays for judgment against the defendant, Louis A. Pradt, executor of Merrit B. Atwater, deceased, and William C. Atwater, and each of them, for the sum of $8,000, with interest thereon at the rate of six per cent. per annum, from the 1st day of November, 1891, until paid, and for his costs herein, and prays for a general attachment against the property of said defendants, including debts owing to them, or either of them, and any choses in action, stocks, legal or equitable interests they may have in stocks or other property, and, that the same, when attached, may be subjected and applied to the satisfaction of plaintiff's claim herein, and further prays for all (general), equitable and proper relief." (Pages 1 to 4.)

At the filing of said petition, a general order of attachment was procured and directed to and placed in the hands of the sheriff of Powell County to execute. A copy thereof can be found on page 6 of the record, and is as follows:

"POWELL CIRCUIT COURT.

M. H. Courtney, Plaintiff, *v.* Louis A. Pradt, Executor of Merrit B. Atwater, Deceased, and William C. Atwater, Defendants.	Order of Attachment.

"The Commonwealth of Kentucky to the sheriff of Powell County:

"You are commanded to attach and safely keep the property of the defendants, Louis A. Pradt, executor of Merrit B. Atwater, deceased, and William C. Atwater, in your county, not exempt from execution or so much thereof as will satisfy the claim of

the plaintiff in this action for twelve thousand eight hundred dollars ($12,800.00) and $100.00 for the costs of the action and to summons the Atwater & Allen Land and Lumber Company—the garnishee—to answer herein on the first day of the next March term of the Powell Circuit Court, and make due return on this order on that day.

"Witness, A. H. Norton, clerk of said court, this 25th day of September, 1901. A. H. Norton,
Clerk, P. C. C."

Counsel for plaintiff in said case, appellant here, endorsed the object of the action upon said general order of attachment, as follows:

"To the Atwater & Allen Land and Lumber Company:

"The object of this action is to attach any money owing by you to the defendants or either of them and to prevent you from paying to them, or either of them, or to any one for them, and to compel you to answer as garnishee herein and hold said money subject to the order of the court—and further to attach the capital stock in said Atwater & Allen Land and Lumber Company belonging to the defendants, or either of tham, and any legal or equitable interest of the defendants therein.

"W. B. Dixon,
"*Attorney for Plaintiff.*"

(Pages 6 and 7 of the record.)

This endorsement was made in pursuance of sub-section 3 of section 203 of Kentucky Civil Code of Practice, which fixes the manner in which a garnishee may be summoned:

"by delivering a copy of the order, with a notice specifying the property attached, to the person holding it; or, as to a debt or demand, to the person owing it (*d*); or, as to stock in a corporation, or property held, or a debt or demand owing, by it, to the officer or agent upon whom a summons may be

served according to the provisions of Sec. 51, and by summoning the person or corporation to answer as a garnishee in the action."

The only execution of said order of attachment the said sheriff attempted to make was to summon the said Atwater & Allen Land and Lumber Company (said last above named Wisconsin corporation) to answer as a garnishee. The sheriff's return is as follows:

"Executed the within attachment on the Atwater & Allen Land and Lumber Company by delivering to Edward Rhubusky, the duly appointed agent of said Atwater & Allen Land and Lumber Company a copy of the within attachment, and summoning said Atwater & Allen Land and Lumber Company to answer as garnishee this September 25, 1901.

"T. B. WARE, *S. P. C.*
"J. M. WELCH, *D. S.*"

The Edward Rhubusky named in the above return of the sheriff, had been designated by the Atwater & Allen Land and Lumber Company as its agent upon whom process could be executed, as required by Section 571, Kentucky Statutes, that company having theretofore transacted business in Kentucky. Said Section 571 is as follows:

"All corporations except foreign insurance companies formed under the laws of this or any other State, and carrying on any business in this State shall at all times have one or more known places of business in this State and an authorized agent or agents thereat, upon whom process can be served; and it shall not be lawful for any corporation to carry on any business in this State until it shall have filed in the office of the Secretary of State a statement signed by its president or secretary, giving the location of its office or offices in this State, and the name or names of its agent or agents

thereat upon whom process can be served; and when any change is made in the location of its office or offices, or its agent or agents, it shall at once file with the Secretary of State a statement of such change; and the former agent shall remain agent for the purpose of service until statement of appointment of the new agent is filed, and if any corporation fails to comply with the requirements of this section, such corporation, and any agent or employe of such corporation, who shall transact, carry on or conduct any business in this State, for it, shall be severally guilty of a misdemeanor, and fined not less than one hundred nor more than one thousand dollars for each offense."

On the 19th of March, 1902, the said Atwater & Allen Land and Lumber Company filed, in said State court, its answer as garnishee, which can be found on pages 7 and 8 of the record, and is as follows:

"The Atwater and Allen Land and Lumber Company, a corporation organized and existing under the laws of the State of Wisconsin, summoned herein as garnishee, says that said M. B. Atwater in his life time owned two hundred and fifty shares of the capital stock of said company of the par value of $45.00 per share, and owned said two hundred and fifty shares at the time of his death and that said shares now stand on the book of said company in the name of said M. B. Atwater and are now held by L. A. Pradt who is the executor of the estate of the said M. B. Atwater.

"That on the 30th day of August, A. D. 1901, a dividend was declared by the directors of said company at a meeting held on that date.

"That the indebtedness to said Pradt, as executor of said M. B. Atwater, deceased, on account of said dividend is $4,757.37 and that said amount is being held by the Atwater & Allen Land and Lumber Company, awaiting the decision of this court.

"Said Atwater & Allen Land and Lumber Com-

pany does not owe anything to said W. C. Atwater who is now a stockholder in said company,

"The said W. C. Atwater has not been a stockholder in said company since the year 1893 and was not a stockholder at the time of the declaration of said division on the 30th day of August, A. D. 1901."

After said answer was filed, to wit, on the 21st day of March, 1902, the said defendants filed in said State court, their petition for removal to the Circuit Court of the United States for the Eastern District of Kentucky, which petition is copied on page 8 of the record. On the filing of that petition the bond of petitioners to be executed on the removal of the case, was presented, accepted, and approved by the State Court, and an order entered removing the case for trial to said Circuit Court. (Record, pages 10 and 11.) After the record was copied and filed in said Circuit Court, to wit, on September 9, 1902, the following motion was entered:

"The defendant, Louis A. Pradt, executor of Merrit B. Atwater, deceased, and William C. Atwater, entering their appearance herein for the purpose of this motion only, move the court to dismiss this cause for a want of jurisdiction to try same." (Page 13.)

At the same time the said Louis A. Pradt, executor, as aforesaid, filed a special demurrer, setting forth his grounds therefor:

1st. That the court has no jurisdiction of the person of this defendant.

2d. That the court has no jurisdiction of the subject matter of the action.

3d. That the complaint does not state facts sufficient to constitute a cause of action.

4th. That it appears upon the face of the said bill of

complaint that this action was not commenced within the time limited by law; to-wit, within the time limited by——.

5th. That the plaintiff is not entitled upon said bill to the relief he prays for because he has a plain and adequate remedy at law.

6th. That the plaintiff hath not in and for his said bill stated such a case as entitled him a court of equity to any discovery from this defendant or to any relief against him as to the matters contained in the said bill of complaint or any of such matters, and that said bill doth not contain any matter of equity whereon this court can ground any decree or give to the plaintiff any relief against this defendant.

At the time the above motion was made and special demurrer filed, the appellant moved the court to remand the case to the State court, but stated no grounds therefor. His motion was as follows:

> "The plaintiff, M. H. Courtney, moves the court to remand this case to the State court from whence it was removed. Breckinridge and Shelby and W. B. Dixon, attorneys for plaintiff." (Page 12.)

Both said motion and demurrer were submitted (page 13). Afterwards, the court filed two opinions thereon (pages 15 to 24). The first of these opinions held that the motion to remand should be overruled (page 18). And both of them held that the motion to dismiss should prevail. A decree was entered in pursuance to said opinion, overruling appellant's motion to remand and sustaining the defendant's motion to dismiss for want of jurisdiction, and noting the fact that on the entering of said decree the plaintiff filed a petition for appeal and an assignment of errors, and that his appeal was allowed as prayed for, which decree is as follows:

"This cause having been heard and submitted on the plaintiff's motion to remand this case to the State court, and on the defendant's demurrer to the jurisdiction of this court, and the motion of the defendant to dismiss this case for want of jurisdiction in this court, and the court being fully advised, it is ordered that the plaintiff's motion to remand this case to the State court be and it is hereby overruled to which plaintiff excepts.

"It is further ordered, adjudged and decreed that defendant's demurrer to the jurisdiction of this court and motion to dismiss this suit for want of jurisdiction in this court, be and the same are hereby sustained, and that this suit be and the same is hereby dismissed for want of jurisdiction in this court. And thereupon came plaintiff in open court and filed his petition for an appeal and assignment of errors, and prayed an appeal to the Supreme Court of the United States from this final decree in dismissing said suit for want of jurisdiction in this court, which appeal is hereby allowed upon the execution of a bond in penalty of $500.00 by plaintiff, M. H. Courtney, with good and sufficient security that appellant shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his plea good, which bond shall operate as a supersedeas."

Appellant's petition and assignment of errors are as follows:

"The above-named plaintiff, M. H. Courtney, conceiving himself aggrieved by the final decree, order and judgment, this day entered in the above entitled cause, dismissing this suit for want of jurisdiction, hereby appeals therefrom and prays that this, his appeal to the Supreme Court of the United States may be allowed, and that a transcript of the record and proceedings and papers upon which said final decree, order and judgment was made, duly authenticated, may be sent to said Supreme Court of the United States, and plaintiff states that the said final

decree, order and judgment contains manifest errors to his prejudice committed, and assigns the following errors, to wit:

I.

"The court erred in overruling and in not sustaining plaintiff's motion to remand this cause to the State court.

II.

"The court erred in sustaining and in not overruling defendant's demurrer to the jurisdiction of this court.

III.

"The court erred in sustaining and in not overruling the defendant's motion to dismiss this suit for want of jurisdiction in this court.

IV.

"The court erred in dismissing this suit for want of jurisdiction in this court.

"Wherefore, this petitioner says that the final decree, order and judgment aforesaid is erroneous, and prays this honorable court to grant him an appeal to the Supreme Court of the United States to the end, that said decree may be reversed, and that said errors may be corrected, and so he will ever pray." (Record, pages 25 and 26.)

No question as to the jurisdiction of the Circuit Court was certified to this court by the Circuit Court for decision, and no application was made to the Circuit Court for such certificate. The appellant has had the entire record copied.

ARGUMENT.

In amplification of the very conclusive opinions of the court below, we present the following:

There was no claim that either of the defendants resided

in, or had any property in, the State of Kentucky capable of manual delivery.

As to the defendant William C. Atwater, no effort was made to reach any property or effects belonging to him, in any jurisdiction. On this point the court below, in its opinion filed the 9th of September, 1902, stated:

> "It is certain that the State court had no jurisdiction so far as William C. Atwater, the surviving partner, was concerned, unless it had jurisdiction of the suit as against the foreign executor of the deceased partner. It is not alleged that William C. Atwater has any property in this State, and the attachment has not been levied upon any property of his, save so far as he may be interested in the property levied on as the property of the deceased partner. The suit should be treated, therefore, as if it were a suit against the foreign executor alone." (Record, page 15.)

No personal service of process on either of the defendants was had or attempted. Appellant's only effort was to reach, by means of the attachment, the stock of Merrit B. Atwater, in the Wisconsin corporation, the Atwater & Allen Land and Lumber Company, and the dividend that had been declared in favor of said Merrit B. Atwater's executor, since his death. The allegations of appellant's petition in that respect are as follows:

> "Plaintiff states that Merritt B. Atwater, at the time of his death, owned stock in said corporation (meaning the Atwater & Allen Land and Lumber Company), and plaintiff states that said corporation now owes the defendant, Louis A. Pradt, executor of Merrit B. Atwater, deceased, a large sum of money as such executor." (Record, page 3.)

The answer of the Atwater & Allen Land and Lumber Company, upon whom only the order of attachment was

attempted to be executed, shows that William C. Atwater is not a stockholder therein, and that that corporation is not indebted to him in any amount. (Record, pages 7 and 8.) The correctness of that answer was never questioned in the court below.

The appellee executor contends that appellant's attachment sued out in the State court, gave to the State court no possible jurisdiction over said stock or dividend, for the following reasons:

First. *Shares of stock in a foreign corporation are not subject to attachment issued by a Kentucky court, although officers of such corporation are carrying on the corporate business in Kentucky.* Thompson's Commentaries on the Law of Corporations, Vol. 2, Sec. 2786; Clark & Marshall on Private Corporations, Vol. 2, page 1152, Sec. 377; Cook on Corporations, Sec. 485; New Jersey Sheep & Wool Co. v. Traders Deposit Bank, *et al.*, 104 Kentucky, page 90 (46 S. W. 677); Pinney v. Nevills, *et al.*, 86 Fed. Rep., 97. In this suit it is nowhere claimed that the said Wisconsin corporation has been vested with the character and status of a domestic corporation in Kentucky.

In Kentucky there is no statute that attempts to create a way by which shares in a foreign corporation can be reached by attachment in the Kentucky courts. Section 194, Kentucky Code of Practice, provides:

> "The plaintiff may, at or after the commencement of an action, have an attachment against the property of the defendant, including garnishees as provided in section 227, as a security for the satisfaction of such judgment as may be recovered—
>
> "I. In an action for the recovery of money against—
>
> "1. A defendant who is a foreign corporation * * *"

Section 203 of said Code provides:

"The order of attachment shall be executed by the sheriff without delay in the following manner * * *

"Upon other personal property, by delivering a copy of the order, with a notice specifying the property attached, to the person holding it, or as to a debt or demand, to the person owing it; or, as to stock in a corporation, or property held, or a debt or demand owing by it, to the officer or agent upon whom a summons may be served according to the provisions of § 51, and by summoning the person or corporation to answer as a garnishee in the action."

Sub-section 3 of Section 51 provides:

"In an action against a private corporation the summons may be served, in any county, upon the defendant's chief officer, or agent, who may be found in this State; or it may be served in the county wherein the action is brought upon the defendant's chief officer or agent who may be found therein."

Section 211 of the Constitution of Kentucky provides; that, no railroad corporation shall have certain rights until it shall become a body corporate pursuant to and in accordance with the laws of Kentucky.

Section 841, Kentucky Statutes, provides that no corporation created by the laws of any State or country other than Kentucky shall control, or own, or operate, a railroad in this State until it, by incorporation, shall become a corporation, citizen, and resident of this State. And then provides that it shall become such citizen and become incorporated in Kentucky by filing in the office of the Secretary of State, and in the office of the Railroad Commission, a copy of its charter, or articles of incorporation.

Section 2786, Thompson's Commentaries, states:

"So far as the writer knows, all the States which prescribe the manner of levying upon shares of corporate stock by execution or attachment, prescribe

that it shall be done by giving *notice* to the corporation, or to its secretary, or to the officer having charge of its books—this notice to the officer in charge of the corporate books being essential to the validity of the seizure. The effect of such a statutory provision necessarily is to make the *situs* of the corporate shares for the purpose of the levy of an execution or attachment the *situs* of the corporation itself. It follows that shares owned by a non-resident defendant in the stock of a foreign corporation can not be reached and levied upon by virtue of an attachment, although officers of the corporation are in the State of the forum, engaged in carrying on the corporate business there."

In said section of Clark & Marshall, the authors discuss the *situs* of shares for the purpose of execution or attachment, saying:

"Their *situs* for the purpose of execution or attachment is held to be in the State where the corporation resides, that is, the State by or under the laws of which the corporation was created, and it has been held, therefore, that they cannot be levied upon in another State, and that it makes no difference that the debtor resides there, or that the certificates of the stock are found there."

Cook on Corporations, Sec. 485, says:

"All attachment statutes provide for the attachment of a non-resident's property in the State, and generally, under such statutes, the stock owned by a non-resident in a corporation, created by the State wherein the suit is brought, may be attached and jurisdiction be thereby acquired to the extent of the value of the stock attached, but a defendant's shares of stock can not be reached by levy of attachment in an action commenced outside of the State wherein the corporation is created. For the purposes of attachment, stock is located where the corporation is

> incorporated, and nowhere else. The shares owned by a non-resident defendant in the stock of a foreign corporation can not be reached and levied upon by virtue of an attachment, although officers of the corporation are within the State engaged in carrying on the corporate business."

Each one of the above-named authors cites various cases and authorities in support of the doctrine announced by them.

In the case of New Jersey Sheep and Wool Co. *v.* Traders Deposit Bank, *et al.*, 104 Ky., 90, the Traders Deposit Bank filed suit in Kentucky against a partnership styled Pidcock & Rodgers, composed of three of the Pidcocks and one John Rodgers, on an indebtedness amounting to more than $3,000.00. Rodgers was brought before the court by personal service. The Pidcocks were sued as non-residents, and were before the court by constructive service only. The New Jersey Sheep and Wool Co., a corporation created under the laws of New Jersey, and R. H. Kyle, its agent, were made defendants, and the summons and order of attachment were served on Kyle individually and as the agent of the wool company. The petition averred that the Pidcocks were stockholders in that corporation, that each of them owned enough paid up and unincumbered stock and undivided profits or surplus therein, subject to distribution, to more than pay the plaintiff's demand. On the question as to whether the plaintiff bank could subject to the payment of its debt the stock in said foreign corporation, the Court of Appeals of Kentucky says:

> "The court did not have jurisdiction to sell the stock which the Pidcocks held in the foreign company."

In support of this statement, the court copies with ap-

proval so much of section 485 of Cook on Corporations as is quoted above.

In the case of Pinney *v.* Nevills, U. S. Circuit Court of Mass., 86 F. R., 97, the facts were practically the same as in the case at bar. The opinion of Judge Colt in that case is as follows:

> "This suit was originally brought in the State court, and removed to this court. The plaintiff is a citizen of Massachusetts, and the defendants are citizens of California. No personal service was made on any of the defendants. The only service which was made was by attachment of certain certificates of stock belonging to the defendants, in the hands of the National Bank of the Republic, located in Boston. These were certificates of stock of the Rawhide Gold-Mining Company, a corporation organized under the laws of West Virginia. The question presented on these motions is whether shares of stock in a foreign corporation owned by a non-resident defendant can be reached by process of attachment under Massachusetts law. The statutes of Massachusetts provide that shares of stock in a corporation organized under the laws of the State, or under the laws of the United States, where such corporation has a usual place of business in the State, may be attached. Pub. St. Mass. c. 161, § 71; Id. c. 171, § 45. There is no provision in the Massachusetts statutes that shares of stock in a foreign corporation can be reached by attachment, except in the case of a corporation organized under the laws of the United States. The general rule of law is that shares of stock in a foreign corporation owned by a non-resident defendant are not subject to attachment. Plympton *v.* Bigelow, 93 N. Y. 592; Ireland *v.* Reduction Co., 19 R. I. 180, 32 Atl. 921; Denton *v.* Livingston, 9 Johns, 96; Winslow *v.* Fletcher, 53 Conn. 390; 4 Atl. 250; Smith *v.* Downey, (Ind. App.) 34 N. E. 823. Motions granted. Case dismissed for want of jurisdiction."

Second. *Said appellee also contends that the dividend due him as a Wisconsin executor from the Atwater & Allen Land and Lumber Company, is not subject to attachment by a Kentucky court, for the reason that he is not, in his representative character, subject to suit in the courts of Kentucky.* On this subject he cites the following authorities:

Vaughn *v.* Northup, 15 Peters, 1;
Am. & Eng. Encyc. of Law, 2d Ed., Vol. 13, p. 957;
Story on Conflict of Laws, Sec. 513;
Cardwell *v.* Harding, *et al.*, 5 Blatch. 510; Fed. Cases, Vol. 4, p. 1036;
Security Insurance Company *v.* Taylor, Fed. Cases, No. 12,607, Vol. 21, p. 973;
Mellus *v.* Thompson, *et. al.*, Fed. Cases, 9405, Vol. 16, p. 1334;
Marrett *v.* Babb, 91 Kentucky, 88;
Maysville R. R. & T. Co. *v.* Marvin, 59 F. R., 91;
L. & N. R. R. Co. *v.* Brantley, 96 Kentucky, 297;
Smith *v.* Baker, 3 Metcalfe (Ky.), 264.

"This is an appeal from a decree of the circuit court of the District of Columbia, sitting for the county of Washington, dismissing a bill in equity, brought by the appellants against the appellees. The facts, so far as they are necessary to be stated upon the present occasion, are: that one James Moody, an inhabitant of Kentucky, died in that State, about the year 1802, intestate, without leaving any children; that in May or June, 1833, the defendant, Northup, obtained letters of administration upon his estate, from the proper court of Jefferson County, in Kentucky; and afterwards, under and in virtue of those letters of administration, he received from the Treasury of the United States the sum of $5,215.56, for money due to the intestate, or his representatives, for military services rendered during the revolutionary war. The present bill was brought by the appellants,

claiming to be the next of kin and heirs of the intestate, for their distributive shares of the said money, against Northup, as administrator; and the other defendants, who are made parties, are asserted to be adverse claimants, as next of kin and distributees. At the hearing of the cause in the court below, the same having been set down for argument upon the plea of Northup, denying the jurisdiction of the court; the bill was ordered to be dismissed for want of jurisdiction; and from that decree, the present appeal has been taken.

"Under these circumstances, the question is broadly presented, whether an administrator, appointed and deriving his authority from another State, is liable to be sued here, in his official character, for assets lawfully received by him, under and in virtue of his original letters of administration. We are of opinion, both upon principle and authority, that he is not. Every grant of administration is strictly confined in its authority and operation to the limits of the territory of the government which grants it, and does not, *de jure*, extend to other countries. It can not confer, as a matter of right, any authority to collect assets of the deceased, in any other State; and whatever operation is allowed to it beyond the original territory of the grant, is a mere matter of comity, which every nation is at liberty to yield or to withhold, according to its own policy and pleasure, with reference to its own institutions and the interests of its own citizens. On the other hand, the administrator is exclusively bound to account for all the assets which he receives, under and in virtue of his administration, to the proper tribunals of the government from which he derives his authority; and the tribunals of other States have no right to interfere with or to control the application of those assets, according to the *lex loci*. Hence, it has become an established doctrine, that an administrator, appointed in one State, can not, in his official capacity, sue for any debts due to his intestate, in the courts of another State; and that he is not liable to be sued in that

> capacity, in the courts of the latter, by any creditor, for any debts due there by his intestate. The authorities to this effect are exceedingly numerous, both in England and America; but it seems to us unnecessary, in the present state of the law, to do more than to refer to the leading principle as recognized by this court, in Fenwick *v.* Sears, 1 Cranch, 259; Dixon's Executors *v.* Ramsay's Executors, 3 *Ibid.* 319; and Kerr *v.* Moon, 9 Wheat, 565. (Vaughn *v.* Northup, *supra*, at pages 3 and 5).

In 13 Am. & Eng. Encyc. of Law, the general rule is stated as follows:

> "An executor or administrator can not be sued in his representative character unless he is made liable by statute, either at law or in equity, in the courts of any State or country other than that in which he has received his appointment."

And a number of decisions of the courts of England, the courts of the United States, and of the States of Alabama, Arkansas, Connecticut, Florida, Illinois, Iowa, Kentucky, Massachusetts, Missouri, New Jersey, New York, North Carolina, Pennsylvania, Tennessee, and West Virginia are cited in support of that statement.

In Story on Conflict of Laws, Sec. 513, the author says:

> "It has hence become a general doctrine in the common law, recognized both in England and America, that no suit can be brought or maintained by any executor or administrator, or against any executor or administrator, in his official capacity in the courts of any other country except that from which he derives his authority to act in virtue of the probate and letters testamentary or the letters of administration there granted to him."

In the case of Cardwell *v.* Harding, *et al.*, 5 Blatch., 510, Judge Shipman held:

> "No action can be maintained against an executor or administrator founded on a debt due from the estate of the deceased, unless he has been duly qualified by a probate tribunal in the State and county where the suit is brought."

In the case of Security Insurance Co. *v.* Taylor, Fed. Cases No. 12,607, being a suit in which an executor was appointed in the State of Wisconsin, but actually summoned in the district in which the suit was pending, it was held by District Judge Blodgett that his court had no jurisdiction. In his opinion, Judge Blodgett says:

> "The law is well settled that executors and administrators can not act out of the jurisdiction in which they are appointed, except by complying with the statutory provisions made by comity in such exterior jurisdiction. For instance, an executor in another State may have ancillary administration in this State, for certain purposes, under the statutes of this State, by probating the will here; in which case the authorities of this State will respect his character as executor, and allow him to proceed and sell or control such portion of the estate as lies within this jurisdiction. This rule, a rule of legislative interstate comity, holds in nearly all the States, as far as my investigation has gone; but it does not in any way override or otherwise compromise the general principle that the power of an executor or administrator is local. In this case the process of this court can not reach the administrators or executors of Emeline Taylor, unless they have made themselves executors within the jurisdiction of this court. This they have not done, and the mere fact that one of the executors came within the jurisdiction of the court upon other business, does not make him amenable to the process of this court in his representative capacity; his official mantle falls when he leaves the jurisdiction in which he was appointed. If persons having claims against the estate of Emeline Taylor wish to pursue their remedy here, they must either take out

letters of administration against the estate in this jurisdiction, or procure the executors to probate the will within this State, before the courts of this State, either State or Federal, can obtain jurisdiction *in personam* of the executors, or of the property of the decedent."

In the case of Nellis *v.* Thompson, Fed. Cases, No. 9405, it was held:

"Repeated decisions have affirmed the principle that no suit can be maintained by or against an executor or administrator, in his official capacity, in the courts of another State except that from which he derived his authority, in virtue of the probate and letters testamentary or the letters of administration there granted to him. Febwick *v.* Sears, 1 Cranch (5 U. S.) 259; Dixon's Ex'rs *v.* Ramsey's Ex'rs, 3 Cranch (7 U. S.) 319; Kerr *v.* Moon, 9 Wheat. (22 U. S.) 565; Armstrong *v.* Lear, 12 Wheat. (25 U. S.) 169. Some attempts have been made by courts of justice in one or two jurisdictions to limit and qualify the general rule laid down in the earlier cases, but without success, as appears in numerous decisions both in this country and in England; and it may now be regarded as the established doctrine, that an executor or administrator appointed in one State can not sue or be sued in his official character for any debts due to or from the estate under his administration in any other State, unless he is first appointed as such administrator or executor in the State where the suit is brought."

In the case of Marrett *v.* Babb, it was held that a foreign personal representative could not sue to recover a debt due his decedent without complying with the provisions of sections 3878 and 3879, Kentucky Statutes, which provide:

"§ 3878. Non-resident representatives—action by. By giving bond with surety, resident of the county

in which the action is brought, non-resident executors or administrators of persons who, at the time of their death, were non-residents of this Commonwealth, may prosecute actions for the recovery of debts due to such decedents.

"§ 3879. Letters of administration—bond to be *executed—action on* bond. In such actions the plaintiff's letters, testamentary or of administration, granted by a competent tribunal, properly authenticated, must be filed; and no judgment shall be rendered until the plaintiff executes bond, with good surety, resident of the county, to the Commonwealth, conditioned to pay any debt due by his decedent to any resident of this State to the extent assets shall come to his hands. Actions may be brought on this bond for the use of any creditor of such decedent for three years after the date of each receipt of assets by such executor or administrator in this State, but not after."

In the case of Maysville Street R. R. & T. Co. *v.* Marvin, and L. & N. R. R. Co. *v.* Brantley, it is held that a foreign personal representative can not sue in Kentucky to recover an estate, other than a debt due to the decedent.

In the case of Smith *v.* Baker, 3 Metcalfe, 264, decided by the Kentucky Court of Appeals, it is expressly held that a suit can not be maintained against a foreign personal representative in Kentucky, where he has not removed into this State and brought with him the assets belonging to the estate. The court, in an opinion by Judge Duvall, says:

"An administrator or executor, who is appointed, or who qualifies in another State, and there receives assets into his hands, may be sued in the tribunals of this State by the person or persons entitled to such assets, *if he shall have removed to and settled in this State.* Such seems to be the well-settled doctrine. (Manion's Adm'r *v.* Titsworth, 18 B. Mon. 597, and cases there cited.)

"But the right to sue a foreign administrator has never been extended further, and in a case like the present, where the debtor died in another State, the administrator having been appointed and qualified there, and being a resident of such State, no action can be maintained against such foreign administrator, in the courts of this State, by a creditor of his intestate. The rule is thus stated by Judge Story: 'If a creditor wishes a suit to be brought in any foreign country, in order to reach the effects of a deceased testator or intestate situated therein, it will be necessary that letters of administration should be there taken out in due form, according to the local law, before the suit can be maintained; for the executor or administrator appointed in another country, is not suable there and has no positive right to, or authority over those assets, neither is he responsible therefor.' (Story on Conflict of Laws, sec. 513.)"

Third. *Appellee still further contends that, the laws of Kentucky nowhere provide for or allow the attachment of assets of a foreign estate if found in reach of Kentucky courts.* Sections 3898 to 3900 provide:

§ 3898. "When administration shall be taken in this Commonwealth on the estate of any person who was an inhabitant of any other State, his personal estate found here, after payment of his debts to citizens of this Commonwealth, shall be disposed of according to his last will, if he shall have executed any, according to the law of his domicile. If there be no such will, his personal estate shall be distributed and disposed of according to the laws of the State of which he was an inhabitant."

§ 3899. "Upon the settlement of such estate, after the payment of the debts in this Commonwealth, the residue of the personal estate, if any, may be distributed and disposed of in the manner stated in the next preceding section; or it may be transmitted, as the county court may think best and order, to the personal representatives, if there be any,

in the State where the decedent had his domicile to be there disposed of according to the law thereof."

§ 3900. "If such person's estate found in this Commonwealth shall be insufficient to pay the creditors here it shall be disposed of without preference, *pro rata*, among the creditors here and such of those elsewhere as prove and demand their debts here within two years after the appointment of a personal representative here. But there must be deducted from such foreign debts the amount received, or which can be received, by the foreign creditors from assets and estate not in this Commonwealth; and if the foreign assets and estate be sufficient to pay all the foreign debts, then no part of them shall be allowed or paid here."

Sections 3878 to 3880 provide:

§ 3878. "By giving bond, with surety, resident of the county in which the action is brought, non-resident executors or administrators of persons who, at the time of their death, were non-residents of this Commonwealth, may prosecute actions for the recovery of debts due to such decedents."

§ 3879. "In such actions the plaintiff's letters, testamentary or of administration, granted by a competent tribunal, properly authenticated, must be filed; and no judgment shall be rendered until the plaintiff executes bond with good surety, resident of the county, to the Commonwealth, conditioned to pay any debt due by his decedent to any resident of this State to the extent assets shall come to his hands. Actions may be brought on this bond for the use of any creditor of said decedent for three years after the date of each receipt of assets by such executor or administrator in this State, but not after."

§ 3880. "If there be an executor or administrator of such decedent qualified by a court of this Commonwealth, he alone shall have power to sue; but any debtor who shall pay his debt, or part of it, according to the provisions of the foregoing sections,

> without notice thereof, shall be discharged to the extent of such payment."

These sections provide a complete system by which such assets can be reached by a resident creditor. Such creditor is nowhere allowed the remedy by attachment, and there is no law by which one of such creditors can secure for himself a preference. In the case of Smith *v.* Baker, *supra*, the Kentucky Court of Appeals states the rule to be as follows:

> "If a creditor wishes a suit to be brought in any foreign country, in order to reach the effects of a deceased testator or intestate situated therein, it will be necessary that letters of administration should be there taken out in due form, according to the local law, before the suit can be maintained; for the executor or administrator appointed in another country, is not suable there, and has no positive right to, or authority over, those assets, neither is he responsible therefor."

We respectfully submit that the judgment of the court below should be affirmed.

EDWIN C. BRANDENBURG,
Attorney for Appellees.

R. D. HILL and
NEAL BROWN,
Of Counsel.

Supreme Court of the United States.

October Term, 1904.

M. H. COURTNEY, *Appellant*,
v.
LOUIS A. PRADT, Executor of MERRIT B. ATWATER, deceased, and WILLIAM C. ATWATER. } No. 93.

APPELLEES' SUPPLEMENTAL BRIEF.

The filing of the brief for appellant was delayed to so short a time before the probable date of hearing of this case, that it became necessary for counsel for appellees to prepare their brief on the merits before having seen appellant's brief, and accordingly this supplemental argument in reply to some of the contentions of appellant seems justified.

The case is presented to this court by the appellant as though the situation were as follows: That the plaintiff had instituted proceedings in his own State of Kentucky to collect his claim against the decedent's estate, at that time in process of administration in the State of Wisconsin, by garnishing the debt of a Wisconsin corporation to the executor of such estate, which debt had its undoubted *situs* in Kentucky by reason of the presence of the Wisconsin corporation in Kentucky through its business operations there; that there was danger that the executor of the estate would collect said debt and withdraw it from Kentucky and distribute it in a foreign jurisdiction, and

thus leave the plaintiff without remedy; that the plaintiff asked nothing more than that through the medium of his attachment proceedings the executor might be prevented from collecting and withdrawing said debt from Kentucky, and thus leaving the plaintiff without remedy; that the result of such proceedings would be to interfere in no wise with those assets of the executor within control of the probate court in Wisconsin having administration of the estate.

But this plausible showing finds but slender foundation in the facts as they appear in the record. The facts are that a portion of the assets of this estate which passed into the possession of the executor was two hundred and fifty shares of stock in the Wisconsin corporation, of the par value of $45 per share, the assets of which corporation practically consisted of real estate in the State of Kentucky (plaintiff's petition, rec., p. 3; answer of garnishee, Atwater & Allen Land & Lumber Company, rec., p. 7); that in August, 1901, before the commencement of this action and after the executor had been in possession of such stock for about three years, the corporation sold this real estate, which, as above stated, practically constituted all its assets, and out of the proceeds of such sale had declared a dividend, the share of said executor therein being $4,575.37. This dividend represented, *pro tanto*, the stock of the corporation in the possession of the executor, and was subject to be paid to him upon demand by the treasurer of said company; that is to say, this dividend was a part of the assets of the estate represented by the executor equally within the jurisdiction of the probate court of Wisconsin from which he had received his letters testamentary as the stock itself and ready to be reduced to the possession of the executor upon his simple demand therefor, and thus the liability of the corporation, or more properly of the treasurer of

the corporation who had custody of the same, to the executor for the payment of such dividend, was unqualifiedly and absolutely in the State of Wisconsin.

These are the facts, and out of which the appellant constructs a debt in the ordinary sense of the word owed by the corporation to the executor and having its *situs* in Kentucky, because of the former business operations of the corporation in that State, ~~whom~~ which there was danger that the executor would collect in Kentucky and remove the proceeds from that State.

Additional emphasis is lent to the foregoing statement by the fact that, as shown by the record, the garnishee corporation had before the garnishment sold all its property in Kentucky and practically ceased to do business there (plaintiff's petition, rec., p. 3), and it is clearly because of this fact that the petition of the plaintiff does not contain the usual allegation in pleading relating to foreign corporations, that it was doing business at the time in the State in which the action was brought. Thus it appears that to all intents and purposes the corporation had ceased to be present in Kentucky for any purpose. Its officers were in Wisconsin; the proceeds of its only assets were in Wisconsin; and there was plainly nothing left for it to do but to wind up its corporate affairs in Wisconsin. There was left, to be sure, a trace of its former presence in Kentucky in the shape of the person whom it had appointed at the time that it began to operate in Kentucky, as its agent upon whom service against it might be made in that State. This appointment had been made in compliance with the statute of Kentucky making such appointment a condition of its right to do business in the State, but it would seem that his functions as such agent had practically ceased with the termination of all business of the corporation in the State.

The statement that if the plaintiff is not allowed the benefit of this action he will be without remedy, is equally

unsupported by the facts appearing in the record. As shown in our principal brief (pages 24 to 26), the statutes of Kentucky not only provide a complete and, as we insist, exclusive remedy in cases of this kind, but they also furnish the same complete protection against any attempt on the part of the executor to collect and remove from the jurisdiction of Kentucky any assets belonging to the estate of his decedent, including debts owing to the estate. Furthermore, it appears from the record that this action was not begun until more than three years after the death of the decedent and that during all that time the executor had in his possession besides this stock in the garnishee company of the par value of $11,250, other assets more than sufficient to pay all the other creditors of the estate except the plaintiff (plaintiff's petition, record, p. 3; answer of garnishee, record, p. 7)—in other words, the estate was perfectly solvent. Hence the plaintiff during those three years had only to present his claim in the Wisconsin probate court in which the estate had been administered and prove the same, if it is susceptible of proof, in order to have it allowed and paid.

We have been at pains to make the foregoing accurate statement of the facts in this case because upon the actual facts in this case the argument of the appellant on this question of jurisdiction must necessarily fail. As we have pointed out in our principal brief and as stated by the court below (rec., pp. 23 and 24), the Kentucky Code of Practice, under which the plaintiff has attempted to proceed, does not on its face give a right of action against a foreign executor or administrator. But the appellant has endeavored by a lengthy and subtle chain of reasoning to show that in the light of former decisions of the courts of Kentucky such jurisdiction is to be read into the statute. In making this argument the appellant is confronted at the outset with the general and well-established rule of law that a foreign executor or administrator can

not be sued outside of the jurisdiction of the State in which he is appointed, a rule laid down by this court and announced in the decisions of many other courts, including the Court of Appeals of Kentucky, and as a general doctrine by Story in his Conflict of Laws, and in the American and English Encyclopædia of Law, all of which we have pointed out at length in our principal brief and which is also recited in the second opinion of the court below (rec., pp. 21 to 24).

An examination of the decisions relied upon by appellant shows that the only modification found in them of this general rule is that suit has been permitted against a foreign executor or administrator in another State than that in which he was appointed in a few special instances where he was actually present in such State and had in his possession, or there were at the time in the State subject to be reduced to his possession, assets which necessity seemed to demand should be subjected to the payment of the claims of creditors of the estate resident in that State. These decisions were very thoroughly and exhaustively reviewed by the court below in the second opinion (rec., pp. 18 to 22), and we feel that we can add nothing to what is there said. Upon that examination the court very justly says:

> "As to the weight of authority on this proposition it is stated in Minor Conflict of Laws, 236, that,
>
> "'If an administrator, appointed in one State, removes with the assets of the estate into another State, the courts are divided upon the question whether or not the decedent's creditors may sue the administrator in the latter State without a reappointment, the weight of authority seeming to favor the right of the creditors to sue. But if the administrator should only come into the State transiently or temporarily, the better opinion would seem to be that no action will lie against him there without a new appointment.'

"The ground upon which the right to sue the foreign executor in such a state of the case is based is necessity. As the foreign executor has removed to the State where suit is brought having wasted the assets collected in the foreign jurisdiction or brought them with him, if he can not be sued there he can not be sued at all. In the Virginia case Judge Tucker said:

"'Upon a full view of the whole subject I am of the opinion that justice, convenience and necessity require a recognition of the right to sue an executor who has qualified abroad if he comes within the jurisdiction bringing the assets with him.'

"The Kentucky case of Keiningham *v.* Keiningham, 71 S. W. 497, and the other Kentucky cases cited in the opinion in that case are all cases of the same sort; and Mr. Minor cites the cases of Atcheson *v.* Lindsey, 6 B. M. 86. Embry *v.* Miller, 1 Mar. along with others, as justifying his statement that the weight of authority is in favor of the right to sue in such a case.

"If necessity is the ground of suit in such a case the pendulum of authority might well swing to the other side if the executor sued is only transiently or temporarily within the State, as Mr. Minor states it has done. And, if such is the ground of the right to sue in such a case, authorities holding that a right to sue exists in such a case are not authorities in support of the contention here that a foreign executor or administrator may be sued in relation to assets located within the State where the suit is brought. For, in relation to such assets, no such suit is essential in order to reach them."

It is perfectly clear, as we have already pointed out, that no sort of necessity exists for disregard of the well-established rule which is here invoked by the appellee executor. The opportunity to prove and collect his claim had been open to the plaintiff for three years prior to the commencement of this action, and at the time that

the action was commenced if there had been any such property of the estate as he alleges in Kentucky, it could not possibly be taken therefrom to his prejudice by the executor, whilst the way was open to the plaintiff, by a method expressly provided in the statutes of Kentucky, to himself proceed to the subjection of such assets to the payment of his claim through administration in his own State.

Unwittingly the appellant has furnished the touchstone for the determination of his contention here in his attempt to meet the logic of the decision of this court in Vaughn *v.* Northrup, *supra*. On page 32 of appellant's brief the following quotation is made from Judge Story's opinion in that case :

> " Every grant of administration is strictly confined in its authority and operation to the limits of the territory of the government which grants it; and does not, *de jure*, extend to other countries. It can not confer, as a matter of right, any authority to collect assets of the deceased in any other State; whatever operation is allowed to it, beyond the original territory of the grant, is a mere matter of comity, which every nation is at liberty to yield or withhold, according to its own policy and pleasure, with reference to its own institutions and the interests of its own citizens. On the other hand, the administrator is exclusively bound to account for all the assets which he received under and in virtue of his administration to the proper tribunals of the government from which he derives his authority; and the tribunals of other States have no right to interfere with or to control the application of those assets, according to the *lex loci*."

And thereupon counsel proceeds to say :

> " The assets referred to here, ' which the tribunals of other States have no right to interefere with or to control,' are evidently meant assets *within the jurisdiction of the appointing government* and *not* assets within the jurisdiction of other States."

And the argument then proceeds upon the line which we have heretofore referred to, that the appellant is merely asking to subject to the payment of his claim assets of the estate within Kentucky and not within the jurisdiction of the State in which the executor received his letters testamentary, assets which the executor must go to Kentucky to collect; and that therefore this proceeding could not in any wise interfere with the assets of the estate within the jurisdiction having administration of the estate. Here is where the actual facts in this case confound appellant's argument. As we have already shown, this dividend which the appellant sought to attach was at the time actually and tangibly within the State of Wisconsin, and the liability of the Atwater & Allen Company to pay the same to the executor existed actually and incontestably at the time in Wisconsin, whilst on the other hand this liability to the executor could be said to have a *situs* in Kentucky only by the most strained legal fiction. Hence the result of the allowance of plaintiff's attachment proceedings would necessarily be to most essentially interfere with the assets "within the jurisdiction of the appointing government." Indeed when it is remembered that up to the time of the declaration of the dividend the stock of the garnishee company was and had been for more than three years actually in the possession of the executor and that the dividend, in effect, took the place *pro tanto* of that stock, the necessary effect of the attachment proceedings would be to directly interfere with property of the estate in the actual possession, to all intents and purposes, of the executor.

EDWIN C. BRANDENBURG,
Attorney for Appellees.

R. D. HILL and
NEAL BROWN,
of Counsel.